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No. 93-1124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARKANSAS PEACE CENTER, *et al.*,
Petitioners,

v.

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The federal defendants do not dispute that there is a conflict among the circuits on the question presented in this petition. Nor do they dispute the importance of the issue. Indeed, in petitioning this Court to decide the same issue earlier this Term, the Solicitor General highlighted both the conflict and the significance of the underlying issue. *See* Petition for a Writ of Certiorari in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). Thus, the Solicitor General's position significantly undercuts the attempt by the other defendants to minimize both the conflict and the importance of the issue.

1. The holding of the Eighth Circuit conflicts squarely with *United States v. Colorado*. In that case, the Tenth Circuit concluded that an action to enforce a state's authority under the Resource Conservation Recovery Act ("RCRA") is not barred by section 113(h) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") because it is not a challenge to the CERCLA response action. *Id.* at 1575, 1576. The Tenth Circuit refused to read section 113(h) to implicitly repeal RCRA's enforcement provisions, and instead construed RCRA's citizens' suit provisions to permit certain RCRA actions to go forward, even where they concern activities at a CERCLA site. *Id.* at 1575-79; *see also Yslava v. Hughes Aircraft Co.*, Nos. 91-525-TUC-JMR & 92-564-TUC-JMR (D. Ariz. Nov. 17, 1993), *reprinted in* 27 Chem. Waste Lit. Rep. 640 (1994) (section 113(h) does not bar claim for medical monitoring of people exposed to contaminated water from Superfund site). The Tenth Circuit acknowledged that section 113(h) applies equally to actions brought by state and private citizen plaintiffs, and for that reason, its holding conflicts with the Eighth Circuit's ruling. Indeed. the government argued in its petition for a writ of certiorari in *Colorado* (at 18) that the Tenth Circuit's interpretation of section 113(h) "is at odds with" the very cases on which it relies in its opposition at 8-9, 11-12. This case warrants review to resolve the conflict among the courts of appeals on the applicability of section 113(h) to RCRA claims.

2. In its opposition to the petition, the government rewrites the question presented to focus solely on whether section 113(h) bars review of one of plaintiffs' claims -- that the incineration of dioxin-containing wastes violated a RCRA performance standard. In fact, plaintiffs' petition also seeks review of whether section 113(h) bars two additional types of claims: namely, plaintiffs' claim that the incineration is causing an imminent and substantial endangerment to human health and plaintiffs' diversity and pendent state law claims to enforce state public health and common law nuisance

standards. The government completely sidesteps the imminent endangerment claim, and relegates the nuisance claim to a footnote. Government Opposition at 16 n.14; *see also* Vertac Site Contractors' Opposition at 12 n.8.

Those claims, however, go to the very heart of this lawsuit. Plaintiffs have alleged (and proven to the satisfaction of the only judge to address this issue) that the incineration of dioxin-containing waste at the Vertac site is causing an imminent and substantial endangerment to human health. The cause of the endangerment (and nuisance) is not the hazardous waste site that is being addressed by the cleanup activities; instead, it is the cleanup itself. In other words, the challenge is to a cleanup that is causing, rather than ameliorating, the harm to plaintiffs.

Because the government ignores plaintiffs' imminent endangerment claim, it understates the import of RCRA's citizen suit provision. Opposition at 9-11. RCRA precludes citizen imminent hazard lawsuits only where the CERCLA response action is abating the conditions creating the endangerment. 42 U.S.C. § 6972(b)(2)(C). By its express terms, RCRA imminent hazard lawsuits may be brought to challenge activities undertaken in the course of a CERCLA response action, which are themselves causing the imminent endangerment. The RCRA citizen suit provision controls because it specifically addresses the viability of citizen suits with respect to CERCLA response actions, while section 113(h) of CERCLA never mentions RCRA, and the only reference in the CERCLA conference report to RCRA claims connected to Superfund cleanup activities indicates that they should be given priority treatment in the courts -- not deferred indefinitely as defendants contend. H.R. Rep. No. 962, 99th Cong., 2d Sess. 225 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276, 3318. Postponing review of imminent endangerment claims until the cleanup has been completed would extinguish such claims altogether,

despite the complete absence of any indication that Congress intended such a harsh result.[1]

3. Finally, the government is simply wrong in its assertion that the judgment below is correct because the court of appeals indicated in *dicta* that it disagreed with the district court's interpretation of a pertinent RCRA regulation, even though the court of appeals did not state whether its interpretation would require outright dismissal of any, let alone all, of plaintiffs' claims. *See* Petition at 14 n.3. That regulation formed the basis of only one of plaintiffs' claims and only one of the grounds for the preliminary injunction at issue. Plaintiffs' imminent endangerment claim does not rise or fall with the court of appeals' interpretation of the RCRA regulation, nor do their state law claims. Since the case was before the court of appeals on a motion for a preliminary injunction, the Eighth Circuit's statement concerning one of plaintiffs' claims that supported the preliminary injunction does not form an independent basis for dismissing the entire case.[2]

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[1]The government and Vertac selectively quote floor statements made by Members of Congress favoring the most expansive reading of section 113(h), and ignore the conference report, which is the most credible piece of legislative history on the meaning of section 113(h), as well as the countervailing floor statements of proponents of a narrow reading of section 113(h). Government Opposition at 8, 11 n.9, 15 n.13; Vertac Opposition at 12-13.

[2]Since the case never proceeded beyond the preliminary injunction stage, plaintiffs cannot be said to have waived the claims that were not fully developed in their motions for emergency relief. Moreover, Vertac omits the portions of section 113(h) that expressly preserve federal diversity jurisdiction in arguing that such claims are barred by section 113(h). Vertac Opposition at 12 n.8.

CONCLUSION

For the reasons set forth above and in the petition, the petition should be granted.

Respectfully submitted,

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